Bohjaraj a/l Kasinathan v Nagarajan a/l Verappan & Anor

HIGH COURT (TEMERLOH) — CIVL APPEAL NO 11–49 OF 2000
RAMLY ALI JC
16 MAY 2001

Tort *— Assault — Assault by servant in course of employment — Damages — Whether plea of 'general damages' enables claim for 'aggravated damages' — Whether plaintiff entitled to damages for personal injuries when evidence had not been disputed — Quantum of damages*

Tort *— Damages — Aggravated damages — Whether plea of 'general damages' enables claim for 'aggravated damages'*

Tort *— Vicarious liability — Assault by servant in course of employment — Bus conductor assaulted passenger — Maintenace of order and discipline of passengers within duty of conductor — Whether act of assaulting so closely connected with what conductor was authorized to do — Whether employer liable*

The plaintiff was a passenger on a bus operated by the second defendant. The plaintiff was also the chairman of the local temple. The first defendant was a bus conductor employed by the second defendant. While in the bus, there was some degree of tension among the passengers in the bus and the first defendant used abusive and vulgar language. The first defendant then assaulted the plaintiff by punching him using a knuckleduster As a result, the plaintiff suffered injuries, inter alia, blurring of vision and macula oedema, and loss of income. The plaintiff claimed damages against both the first defendant and also the second defendant as vicariously liable for the wrong committed by its servants. During the trial, the first defendant admitted that part of his duties was to maintain order and discipline of passengers travelling in the bus. The learned magistrate found that the first defendant was wholly to be blamed for the injury suffered by the plaintiff and that the plaintiff's claim against the second defendant be dismissed with costs on the ground that the second defendant was not vicariously liable for the act of the first defendant. The plaintiff was awarded RM4,000 as general damages but no order was made for special and exemplary damages. The plaintiff appealed against the whole decision against the second defendant and on quantum against the defendants. The issues for determination were: (i) whether the second defendant was vicariously liable over the wrongful conduct of the first defendant in assaulting the plaintiff in the course of his employment with the second defendant; (ii) whether the plaintiff was entitled to aggravated damages although it was not specifically pleaded; (iii) whether the plaintiff was entitled to damages for personal injuries when evidence was not disputed.

Held, allowing the appeal:

(1) The learned magistrate had erred in not properly applying the relevant principle of law to the facts of this case. The first defendant personally admitted in evidence that one of his duties as a bus conductor in the employment of the second defendant was the maintenance of order and discipline of passengers in the bus. The facts showed that there was some degree of tension among the passengers in the bus. It could be inferred that the situation required the first defendant as the conductor of the bus to exercise his duty to maintain order in the bus. The first defendant had done it, but he had exceeded his authority by using abusive and vulgar words and also by using force. The first defendant's conduct in assaulting the plaintiff was so closely connected with the acts which he was authorized (ie to maintain order in the bus), that it may rightly be regarded as modes — although improper modes of doing it. Thus, the second defendant was vicariously liable for the said conduct of the first defendant (see pp 505H, 506D–E).

(2) The plaintiff was entitled to aggravated damages. It was sufficient for the plaintiff to plead 'general damages' in his statement of claim to enable him to claim 'aggravated damages'. In assessing 'aggravated damages' the court has to consider all the relevant circumstances of the case including the character of the parties involved. The plaintiff, although not holding any high post with high salary, was the chairman of the local temple at the time of the incident. Thus, he was entitled to self-respect and dignity. By the acts of the first defendant the plaintiff had suffered humiliation, loss of pride and self-esteem. To compensate the plaintiff for the injury to his feelings, the court awarded him a sum of RM10,000 as aggravated damages (see pp 508H–I, 509E–F).

(3) The injuries 'blurring of vision' and 'macula oedema' were stated in the medical report and accepted as evidence. The was no indication that the second defendant had objected to the admissibility of the medical report. Neither was there any indication that the second defendant had disputed the contents of the said report. Thus, the said injuries should be taken into account in assessing general damages by the learned magistrate. The court awarded RM5,000 to the plaintiff for the said injuries (see pp 509H–510A).

[**Bahasa Malaysia summary**

Plaintif merupakan seorang penumpang bas yang dikendalikan oleh defendan kedua. Plaintif juga merupakan pengerusi kuil tempatan. Defendan pertama adalah seorang konduktor bas yang digaji oleh defendan kedua. Semasa dalam bas, suasana amat tegang di antara para penumpang dalam bas dan defendan pertama telah

menggunakan bahasa yang menghina dan biadab. Defendan pertama kemudiannya menyerang plaintif dengan menumbuknya menggunakan buku lima. Akibatnya, plaintif mengalami kecederaan, antara lain, kekaburan penglihatan dan macula oedema, serta kehilangan pendapatan. Plaintif menuntut gantirugi terhadap kedua-dua defendan pertama dan defendan kedua sebagai bertanggungjawab secara vikarius atas kesalahan yang dilakukan oleh pekerja-pekerjanya. Semasa perbicaraan, defendan pertama mengaku bahawa sebahagian daripada tugasnya adalah untuk mengekalkan peraturan dan disiplin penumpang yang menaiki bas tersebut. Majistret yang arif mendapati bahawa defendan pertama harus dipersalahkan secara seratus peratus untuk kecederaan yang dialami oleh plaintif dan bahawa tuntutan plaintif terhadap defendan kedua ditolak dengan kos berdasarkan alasan bahawa defendan kedua tidak bertanggungjawab secara vikarius untuk tindakan defendan pertama. Plaintif diawardkan RM4,000 sebagai gantirugi am tetapi tiada perintah dibuat mengenai gantirugi khas dan gantirugi teladan. Plaintif merayu terhadap keseluruhan keputusan terhadap defendan kedua dan atas kuantum terhadap defendan-defendan. Isu-isu untuk penentuan adalah sama ada: (i) defendan kedua adalah bertanggungjawab secara vikarius atas kelakuan salah defendan pertama dalam menyerang plaintif semasa penggajiannya dengan defendan kedua; (ii) plaintif berhak menerima gantirugi melampau (aggravated damages) walaupun ia tidak diplidkan secara khusus; (iii) plaintif berhak menerima ganti rugi untuk kecederaan peribadi apabila keterangan tidak dipertikaikan.

Diputuskan, membenarkan rayuan tersebut:

(1) Majistret yang arif terkhilaf dalam tidak memakai prinsip undang-undang yang relevan dengan wajarnya dalam fakta-fakta kes ini. Defendan pertama sendiri mengaku dalam keterangan bahawa salah satu daripada kewajipannya sebagai seorang konduktor bas dalam penggajian defendan kedua adalah pengekalan peraturan dan disiplin para penumpang dalam bas. Fakta-fakta menunjukkan bahawa wujudnya suasana yang tegang di antara penumpang dalam bas. Boleh dikatakan bahawa keadaan itu menghendaki defendan pertama sebagai konduktor bas melaksanakan kewajipannya untuk mengekalkan peraturan dalam bas. Defendan pertama telah berbuat demikian, tetapi ia telah melampaui kuasanya dengan menggunakan kata-kata yang menghina dan biadab dan juga dengan menggunakan keganasan. Kelakuan defendan pertama dalam menyerang plaintif adalah begitu terikat dengan tindakan yang diberikuasanya (iaitu untuk mengekalkan kepatuhan dalam bas), hinggakan ia boleh dianggap sebagai cara — walaupun tidak betul — untuk menjalankan tugasnya. Justeru itu, defendan kedua adalah bertanggungjawab secara vikarius atas kelakuan defendan pertama (lihat ms 505H, 506D–E).

(2) Plaintif berhak menerima gantirugi melampau. Adalah mencukupi untuk plaintif memplid 'gantirugi am' dalam pernyataan tuntutan beliau bagi membolehkannya menuntut gantirugi melampau. Dalam menaksir gantirugi melampau mahkamah harus menimbang semua keadaan relevan dalam kes termasuk akhlak pihak-pihak terlibat. Plaintif, walaupun tidak memegang jawatan tinggi dengan gaji yang tinggi, adalah pengerusi kuil tempatan sewaktu kejadian itu berlaku. Justeru itu, beliau berhak mengekalkan kehormatan diri dan kedudukannya. Melalui perbuatan-perbuatan defendan pertama, plaintif telah menderita penghinaan, dan kebanggaan dan harga diri beliau telah dicederakan. Untuk mempampas plaintif atas kecederaan kepada perasaannya, mahkamah mengawardkan beliau jumlah sebanyak RM10,000 sebagai gantirugi melampau (lihat ms 508H–I, 509E–F).

(3) Kecederaan-kecederaan penglihatan yang kabur dan 'macula oedema' dinyatakan dalam laporan perubatan dan diterima sebagai keterangan. Tiada apa-apa yang menunjukkan bahawa defendan kedua telah membantah terhadap kebolehterimaan laporan perubatan. Tiada juga apa-apa yang menunjukkan bahawa defendan kedua telah mempertikaikan kandungan laporan tersebut. Justeru itu, kecederaan tersebut harus diambil kira dalam menilai gantirugi oleh majistret yang arif. Mahkamah mengawardkan RM5,000 kepada plaintif untuk kecederaan tersebut (lihat ms 509H–510A).]

Notes

For cases on assault, see 12 *Mallal's Digest* (4th Ed, 2000 Reissue paras 5–10.

For cases on aggravated damages and damages for assault, see 12 *Mallal's Digest* (4th Ed, 2000 Reissue) paras 116–117.

For cases on vicarious liability, see 12 *Mallal's Digest* (4th Ed, 2000 Reissue) paras 1312–1313.

Cases referred to

Ansell v Thomas (1974) Crim LR 31 (refd)
Broome v Cassell & Co [1972] AC 1027 (refd)
Canadian Pacific Railway Co v Lockhart [1942] AC 591 (refd)
Dyer and Wife v Munday & Anor (1895) 1 QB 742 (refd)
Goh Choon Seng v Lee Kim Soo [1925] AC 550 (refd)
Ilkiw v Samuel [1963] 2 All ER 879 (refd)
Jefferson v Derbyshire Farmers Ltd [1921] 2 KB 281 (refd)
Keppel Bus Co Ltd v Sa'ad bin Ahmad [1972] 2 MLJ 121 (refd)
Keppel Bus Co Ltd v Sa'ad bin Ahmad [1974] 1 MLJ 191 (refd)
Marsh v Mooves [1949] 2 All ER 27 (refd)
Motor Sports International v Delcont(M) Sdn Bhd [1996] 2 MLJ 605 (refd)

Roshairee bin Abd Wahab v Mejar Mustafa bin Omar [1996] 3 MLJ 337 (refd)

(*Zuki Ghandi & Amin*) for the appellants.
(*Shui-Tai*) for the respondents.

Mohd Hishamudin J:

Introduction

This is an appeal by the appellant/plaintiff against the decision of the learned magistrate of Temerloh, Pahang made on 14 November 2000. In that decision, the learned magistrate had found that the first defendant was wholly (100%) to be blamed for the injury suffered by the plaintiff and that the plaintiff's claim against the second defendant be dismissed with costs on the ground that the second defendant was not vicariously liable for the act of the first defendant. The learned magistrate also ordered that the first defendant pay the plaintiff a sum of RM4,000 as general damages. The order also made specific mention that there was no order for special damages and exemplary damages. The plaintiff now is appealing against the whole decision against the second defendant and on quantum against the first defendant. The first defendant did not appear in this appeal.

Facts of the case

The plaintiff was, at all material times, a passenger on a bus operated by the second defendant, The Pahang South Union Omnibus Co Bhd. The first defendant, at that material time, was a bus conductor employed by the second defendant. On 1 July 1997 at 6.30pm, the plaintiff boarded bus no CL 3490. The first defendant was the bus conductor then. While in the bus, the first defendant had assaulted the plaintiff by punching him using a knuckleduster (buku lima). As a result of the assault the plaintiff suffered the following injuries, ie soft tissue injury; lacerated wound 3cm x 3cm and haematoma — above right eye, tender between both eyes; blurring of vision in right eye (macula oedema). The plaintiff also suffered loss of income. The plaintiff brought an action claiming damages against both the first defendant and also the second defendant, as vicariously liable for the wrong committed by its servant.

The appeal

The appellant is not satisfied with the findings of the learned magistrate in dismissing his claim against the second defendant on the ground that the plaintiff had failed to prove that the second defendant was vicariously liable for the wrongful conduct of the first defendant. The learned magistrate ruled that the first defendant's act in assaulting the plaintiff while he was travelling in the said bus was not within the job responsibility of the first defendant and thus was not sanctioned by the second defendant at any time. On the question of quantum of damages, the plaintiff contended that the learned magistrate had failed to take into account the injuries on 'blurring of vision' and 'macula oedema' as well as on aggravated damages.

Appellant's arguments

The appellant argued that the second defendant, being the employer of the first defendant, at the material time, should be held vicariously liable for the wrongful conduct of the first defendant committed in the course of his employment. The plaintiff contended that since part of the first defendant's duties as a bus conductor is to maintain the order and discipline of passengers travelling in the bus (as admitted by the first defendant in his testimony), the first defendant's conduct in punching and assaulting the plaintiff must be considered to be within the scope of his employment. Thus the second defendant must be held to be vicariously liable for such a conduct.

As to the issue of aggravated damages, the plaintiff argued that even though he is not a person holding a high post with a high salary, the plaintiff, 46 years old, being chairman of the local temple, was still entitled to aggravated damages as he had been humiliated by the first defendant in public. The plaintiff also contended that he should be awarded general damages for 'blurring of vision' and 'macula oedema', as the injuries were included in the medical reports (P3) which had been accepted and admitted as evidence.

Respondent's argument

The second defendant/respondent admitted employing the first defendant as a bus conductor, but denied liability on the ground that the assault was not within the scope of the bus conductor's authority and was an independent act unconnected with his employment.

On the question of 'aggravated damages', the respondent contended that the claim was not specifically pleaded by the appellant. As to the general damages on 'blurring of vision' and 'macula oedema', the respondent argued that the appellant had failed to prove the nexus between the injuries to the said assault by the first defendant.

Detailed facts of the incident

The evidence showed that on the day in question, the plaintiff had boarded the bus at 6.30pm. After travelling for about two km, the bus stopped. A few school children boarded the bus. Some of the school children could not get seats as the bus was full. About five to six of them were standing near the plaintiff's seat. On seeing this, the first defendant asked the school children to move inside and to sit down. The school children failed to respond as there were no vacant seats available at that time. Then, the first defendant shouted at them, using vulgar and abusive words, asking the school children to move inside and to sit down. The first defendant repeated the words 'Hoi, anak haram duduk' a few times. On hearing this, the plaintiff commented and asked the first defendant as to why he (the first defendant) shouted at the school children using vulgar and abusive words as there were no more vacant seats available at that time. Apparently, the first defendant got angry and challenged the plaintiff to a fight. There was

an exchange of words between the first defendant and the plaintiff. He then moved slowly towards the plaintiff who was still seated, took out something from his pocket (which was later found out to be a knuckleduster) and punched the plaintiff's head. The first defendant then pulled the plaintiff's collar and pushed him down. The driver of the bus (PW2) stopped the bus to intervene. Later the plaintiff lodged a police report. According to PW2 (the bus driver), he saw the first defendant punch and push the plaintiff. PW2 did not see the plaintiff punching the first defendant at any time.

On the evidence adduced, the learned magistrate found that the first defendant was wholly (100%) liable in assaulting the plaintiff.

Exercises of appellate jurisdiction

The first issue that needs to be stressed here is to what extent this court, in exercising its appellate jurisdiction, can interfere with the findings of the learned magistrate in this case? It is well settled law that in exercising its appellate jurisdiction, this court can only interfere with the findings or decision of the learned magistrate when the learned magistrate has erred in principle and law, or has taken into account an irrelevant consideration, or has failed to take into account a relevant consideration when arriving at his decision, or that the decision made had caused an injustice (see *Motor Sports International v Delcont (M) Sdn Bhd* [1996] 2 MLJ 605).

Counsel for the respondent submitted that the learned magistrate had made his decision after hearing all the witnesses during the trial. He was in the best position to evaluate the weight of the evidence given by those witnesses. He is the best person to decide based on the evidence before him, which of the stories to believe. He had the benefit of seeing and observing the witnesses and their demeanour. So, in the absence of manifest error on the part of the learned magistrate, it is submitted that his findings should not be disturbed by this court.

In this case, the learned magistrate, at the end of the trial had decided that the first defendant was wholly (100%) liable for the assault on the plaintiff. That finding is not disputed or challenged in this appeal. There is also nothing to show that the learned magistrate had erred in coming to that decision. Thus, it is not proper for this court to disturb the said decision.

The subject matter of this appeal is on the question of vicarious liability of the second defendant over the wrongful conduct of the first defendant in assaulting the plaintiff in the course of his employment with the second defendant. Based on the evidence which had been admitted and accepted by the learned magistrate, the issue to be determined is whether the second defendant (respondent) was vicariously liable for the wrongful conduct of the first defendant. In deciding the issue, the learned magistrate has to exercise his mind and apply the existing laws and principles on vicarious liability to the facts of this case. This was not based entirely on the demeanour of the witnesses and therefore the appellate court is in as good a position or as bad a position as the learned magistrate was to decide on the issue. In this respect, I am satisfied that the learned magistrate had not properly exercised his mind on the issues before him. As such, it would be

unreasonable and unjust for this court not to interfere with the findings on the issue of vicarious liability of the second defendant (respondent).

Decision of the learned magistrate on the issue

The learned magistrate had concluded that the plaintiff had failed to prove that the second defendant (respondent) was vicariously liable on the ground that the first defendant's conduct in assaulting the plaintiff was not an act authorized by the second defendant. He cited the case of *Roshairee bin Abd Wahab v Mejar Mustafa bin Omar* [1996] 3 MLJ 337 as an authority. He also found that the conduct of the first defendant was not within the authorized responsibility of the first defendant as a bus conductor. However, the learned magistrate conceded in his grounds of judgment that one of the duties of the first defendant (as testified by the first defendant personally) is the maintenance of order and discipline in the bus.

The applicable laws

As early as 1895, Lord Esher MR in *Dyer and Wife v Munday & Anor* [1895] 1 QB 742 (CA), ruled that:

> The liability of a master does not rest merely on the question of authority, because the authority given is generally to do the master's business rightly; but the law says that if, in the course of carrying out his employment, the servant commits an excess beyond the scope of his authority, the master is liable.

In the same case, Lopes LJ had said:

> The law says that for all acts done by a servant in the conduct of his employment, and in furtherance of such employment, and for the benefit of his master, the master is liable, although the authority that he gave is exceeded.

It was also held in that case that the mere fact that the assault was a criminal offence, and not only a tortious act, did not affect the liability of the master for the act of his servant.

The general principles ruling a case of this type were laid down in *Salmond on Torts* (9th Ed) at p 95, namely:

> It is clear that the master is responsible for acts actually authorized by him: for liability would exist in this case, even if the relation between the parties was merely one of agency, and not one of service at all. But a master, as opposed to the employer of an independent contractor, is liable even for acts which he has not authorized, provided they are so connected with acts which he has authorized that they, may rightly be regarded as modes — although improper modes — of doing them. In other words, a master is responsible not merely for what he authorizes his servant to do, but also for the way in which he does it… On the other hand, if the unauthorized and wrongful act of the servant is not so connected with the authorized act as to be a mode of doing it, but is an independent act, the master is not responsible: for in such a case the servant is not acting in the course of his employment, but has gone outside of it.

The above principles were followed in *Marsh v Mooves* [1949] 2 All ER 27; *Canadian Pacific Railway Co v Lockhart* [1942] AC 591 (PC); *Keppel Bus Co Ltd v Sa'ad bin Ahmad* [1972] 2 MLJ 121; *Keppel Bus Co Ltd v Sa'ad bin Ahmad* [1974] 1 MLJ 191 (PC) ; and *Roshairee Abd Wahab v Mejar Mustafa Omar & Ors*.

In *Goh Choon Seng v Lee Kim Soo* [1925] AC 550, the Privy Council ruled that where a servant is doing some work which he is appointed to do, but does it in a way which his master has not authorized and would not have authorized, had he known of it, the master is nevertheless responsible.

In the above principles, the expression 'course of employment' is very vital for consideration. Rigby LJ, in *Dyer and Wife v Munday & Anor* clarified that:

> The law on the matter was laid dawn by Willes J in *Bayley v Manchester, Sheffield, and Lincolnshire Ry Co*: 'A person who puts another in his place to do a class of acts in his absence necessarily leaves him to determine, according to the circumstances that arise, when an act of that class is to be done, and trusts him for the manner in which it is done; and consequently he is held answerable for the wrong of the person so entrusted either in the manner of doing such an act, or in doing such an act under circumstances in which it ought not to have been done; provided that what was done was done, not from any caprice of the servant, but in the course of the employment.

Lord Kilbrandon, in the *Keppel Bus* case held that 'the course of employment' is not limited to the obligations which lie on an employee by virtue of his contract of service. It extends to acts done on the implied authority of the master.

According to *Salmond on Torts* (13th Ed), art 36, at p 122:

> A master is not responsible for a wrongful act done by his servant unless it is done in the course of his employment. It is deemed to be so done if it is either: (i) a wrongful act authorized by the master; or (ii) a wrongful and unauthorized mode of doing some act authorized by the master.

It has also been decided by the Privy Council in *Keppel Bus*'s case that each case on this branch of the law (vicarious liability) must stand upon its own facts. The principles established by the above authorities on this matter is clear and plain, but the difficulty lies in its application to particular facts of each case. This difficulty was admitted by Diplock LJ in *Ilkiw v Samuel* [1963] 2 All ER 879 at p 886; and Bankes LJ in *Jefferson v Derbyshire Farmers Ltd* [1921] 2 KB 281.

In our present case, I am of the view that the learned magistrate had erred in not properly applying the relevant principle of law to the facts of this case. Here, the first defendant personally admitted in evidence that one of his duties as a bus conductor in the employment of the second defendant is the maintenance of order and discipline of passengers in the bus. The manager of the second defendant (DW1) also testified that the first defendant was supposed to be in charge of the safety of the passenger in the bus. He went on to say that the second defendant never gave authority to the first defendant to use abusive language or to use force when performing

his duties. The first defendant also cannot invade the passenger. According to DW1, if any passenger refuses to follow his instruction, the first defendant may push the bell and ask the passenger to step down or to get help from the nearest police station.

It is not disputed that the assault on the plaintiff by the first defendant took place while the first defendant was in the course of his employment as a bus conductor, and the plaintiff was a passenger of the said bus. It is also not disputed that the incident started when the first defendant had asked some school children (who were then standing in the bus) to move inside and to sit down. When the children refused, the first defendant shouted at them, uttering abusive and vulgar words. The plaintiff, who was seated nearby took exception and questioned the first defendant as to why he shouted abusive and vulgar words at the school children. The first defendant got angry. Then there was an exchange of words between the first defendant and the plaintiff. The first defendant then challenged the plaintiff to a fight, which the plaintiff declined. Finally, the first defendant moved towards the plaintiff and punched the plaintiff, apparently using a knuckleduster. The facts show that there was some degree of tension among the passengers in the bus. It could be inferred that the situation required the first defendant as the conductor of the bus to exercise his duty to get all passengers to move inside and to sit down and to maintain order in the bus. The first defendant had done it, but he had exceeded his authority by using abusive and vulgar words and also by using force. To my mind, the first defendant's conduct in assaulting the plaintiff is so closely connected with the acts which he was authorized (ie to maintain order in the bus), that it may rightly be regarded as modes — although improper modes — of doing it. Thus, applying the authorities cited above, I am satisfied that the second defendant was vicariously liable for the said conduct of the first defendant.

In *Roshairee Abd Wahab v Mejar Mustafa Omar & Ors*, the plaintiff was ragged and assaulted by the first two defendants while undergoing an orientation programme shortly after reporting for duty with the Royal Malay Regiment. The first defendant was the officer in charge of the orientation programme. The plaintiff also claimed damages against the third defendant, the government of Malaysia, by way of vicarious liability for the first two defendants. Applying the same principle of law as stated in *Salmond On Torts*, James Foong J held that eventhough ragging among officers was expressly prohibited and the first defendant's acts of assault were unauthorized by the third defendant, they were carried out during the normal course of duty of the first defendant. Such being the case, his unauthorized acts have become so connected with his authorized acts that the court (in that case) found them to have become 'modes — although improper modes — of doing them'. Thus, the third defendant was held vicariously liable for the unlawful actions of the first defendant. The relevant test applied by James Foong J in the above case was that the actions were 'carried out during the normal course of duty' of the first defendant. In our present case, the same test should also apply, ie that the action of the first defendant in assaulting the plaintiff was carried out during the normal course of his duty as a bus conductor, at the material times.

The second defendant operates a bus service for the public within the locality. The service is meant for the members of the public. Any member of the public may stop the bus and upon payment of necessary fares, make use of the service provided. Therefore, the second defendant should be held responsible for the safety of the passengers while traveling in the bus, not only from interference by third parties, but also from any misbehaviour or misconduct of its own servants, either the driver or the conductor of the bus. The second defendant should not be allowed to escape liability which arises from the conduct of the servant just by saying that the servant was not authorized to commit the conduct. In this respect, I fully agree with the remarks made by the trial judge in *Keppel Bus*'s case which was cited by the Court of Appeal (Singapore) [1972] 2 MLJ 121:

> A bus conductor's lot is quite often a very harassing one especially in a busy metropolis and particularly during peak hours of traffic. He is often, in the proper discharge of his duties, called upon to show qualities of patience, tolerance, tact and forbearance. In the course of his duties he will have to deal with all kinds of passengers.
>
> Apart from collecting the appropriate fares from the passengers and seeing that they get in and alight from the bus properly he is also responsible for the maintenance of order in the bus and the general welfare of all the passengers. Bus companies should take good care to see that people with the wrong temperament are not employed by them in this capacity. Otherwise they may run the risk of having to meet situations such as this.

The counsel for the respondent (second defendant) argued that the decision in *Keppel Bus*'s case should be applicable to the present case. In that case, the plaintiff, a passenger in a bus belonging to defendant company, was assaulted by the conductor of the bus, a servant of the defendant. The Privy Council, in reversing the decisions of the trial court and Court of Appeal in Singapore, held that there was no evidence which would justify the ascription of the act of the conductor to any authority, express or implied, rested in him by the defendant. It was therefore held that the defendant was not vicariously liable for the conduct of the conductor in assaulting the plaintiff.

As had been stated earlier, each case must depend on its own facts. Lord Kilbrandon in the above case itself, had stated so. Facts may differ from one case to another. Thus, a finding of facts in one case may not necessarily be applicable to another case even though the same principle of law applies. In *Keppel Bus*'s case, the Privy Council found that, upon the facts, even though it may be accepted that the keeping of order among the passengers was part of the duties of the conductor, there was no evidence of disorder among the passengers at the time of the assault. Thus, there was no evidence to show an emergency situation calling for forcible action on the part of the conductor.

The facts of that case can be distinguished from the facts of our present case. In that case (*Keppel Bus*'s case) at one point of the journey, an elderly Malay lady indicated that she wanted to get off the bus. The conductor ordered her 'in a loud and rude manner' to go and wait near the exit. The plaintiff who was a passenger in the bus, took exception to this instruction

and the manner in which it was given; he demonstrated that it was not safe for the lady to stand by the exit, which was at the entrance. An altercation broke out between him and the conductor, in the course of which each tried to hit the other. Other passengers intervened and separated them. The bus stopped, the lady got off and some passengers got on. The conductor began collecting fares as usual. As he did so, he abused the plaintiff using a very rude expression. The plaintiff stood up and asked the conductor not to use abusive language; he then sat down. After he had sat down the conductor struck him in the eye with the ticket punch, breaking his glasses, and causing the loss of the sight of the eye.

From the facts given, it is clear that there was a lapse of time between the incident of the treatment of the Malay lady by the conductor and the incident when the conductor struck the plaintiff. The Malay lady had by then, left the bus; normalcy has been restored, except, apparently for some simmering resentment in the conductor which caused him to misbehave himself. Thus, in the circumstances, the conductor cannot be said to be quelling disorder when he struck the plaintiff, as there was no disorder ever existing at that time. The situation had gone back to normal.

However, in our present case, there was no lapse of time or gap between the first defendant's conduct in asking the school children to move inside the bus and to sit down up to the time when he punched the plaintiff. The incidents were so closely connected so as to form one transaction or one incident. Tension was building up when the plaintiff intervened and later when there was an exchange of words between them. There were already signs of imminent disorder cropping up at that time. Then, the assault followed immediately.

On those premises, I am satisfied that the findings of fact in *Keppel Bus*'s case do not apply to our present case. Each case stands on its own facts.

Quantum of damages

On the question of quantum of damages, the appellant (plaintiff) raised two issues, namely:

i) that the learned magistrate had erred in law and fact for not awarding the appellant aggravated damages; and

ii) that the learned magistrate had erred in law and fact for not awarding general damages on blurring of vision and 'macula oedema'.

Aggravated damages

The learned magistrate made no award and no mention about aggravated damages in his judgment. It is trite law that 'aggravated damages' are part of general damages and thus need not be specifically pleaded. It is sufficient for the plaintiff to plead 'general damages' in his statement of claim to enable him to claim 'aggravated damages'. In assessing 'aggravated damages', the court has to consider all the relevant circumstances of the case including the character of the parties involved.

In *Broome v Cassell & Co* [1972] AC 1027 at p 1124, Lord Diplock described aggravated damages as:

> Compensation for the injured feelings of the plaintiff where his sense of injury resulting from wrongful physical act is justifiably heightened by the manner in which or motive for which the defendant did it.

In *Ansell v Thomas* (1974) Crim LR 31, Edmund Davis LJ held that aggravated damages is to compensate the plaintiff for injuries affecting his feelings arising out of the tortious acts of the defendants, and in assessing this, all the circumstances of the case must be taken into account, including the character of the plaintiff.

In *Roshairee Abd Wahab's* case, the court accepted the submission that aggravated damages can be awarded within the category of compensatory damages. The court further ruled that:

> In the opinion of this court, the plaintiff may at the material time be weaker, less experienced and lower in rank to the first and second defendants, but he was entitled, as all young officers do, to self respect and dignity. By the acts of the first and second defendants, he has suffered humiliation, loss of pride and self esteem. Instead of being encouraged, advised and protected by these two seniors, the plaintiff was insulted and assaulted by them. To compensate the plaintiff for the injury to his feelings, this court awards a sum of RM50,000 as aggravated damages.

In our present case, I am also of the opinion that the plaintiff is entitled to aggravated damages. The plaintiff, although not holding any high post with high salary, was the chairman of the local temple at the time of the incident. This was clearly stated by PW2 — the driver of the bus. Thus, he was entitled to self respect and dignity. By the acts of the first defendant, the plaintiff suffered humiliation, loss of pride and self esteem. To compensate the plaintiff for the injury to his feelings, this court awards him a sum of RM10,000 as aggravated damages. To my mind, this sum is fair and reasonable after taking into consideration all the relevant factors particularly the status of the plaintiff in his community.

General damages on 'blurring of vision' and 'macula oedema'

For general damages, the learned magistrate awarded the plaintiff a sum of RM4,000 for 'laceration' and 'haematoma'. The learned magistrate did not make any award for 'blurring of vision' and 'macula oedema'. In his grounds of judgment, the learned magistrate said that he did not make any award for 'blurring of vision' because the plaintiff had failed to establish the nexus between the said injury and the assault by the first defendant.

The injuries 'blurring of vision' and 'macula oedema' were stated in the medical report — P3. The said medical report had been accepted as evidence and marked as P3. From the report, it appears that the plaintiff had complained of 'blurring of vision' over his right eye after the assault. He was then referred to an eye clinic on 22 July 1997. On checking, it was found that there is mild oedema in the macula area. Thus the doctor had formed an impression that there is macula oedema on the right eye. There

is no indication that the second defendant (respondent) had objected to the admissibility of the medical report. Neither is there any indication that the respondent had disputed the contents of the said report. Thus, the said injuries should be taken into account in assessing general damages by the learned magistrate. I accordingly award RM5,000 to the plaintiff for the said injuries.

Appeal allowed.

Reported by Moy Saw Han